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Decisions of State Courts as Rules of Decision for Federal Courts on Common Law Questions

J. B. Fordham

DECISIONS OF STATE COURTS AS RULES OF DECISION FOR FEDERAL COURTS ON COMMON LAW QUESTIONS[1]

In a case governed by the common law of a state should the federal courts follow the decisions of the highest court of that state finding the applicable principle of the common law? The United States Supreme Court has recently answered that question in the negative in a case in which it found the question involved to be one of "general law."[2] The other half of the usual rule is that the federal courts will follow state court decisions on matters of "local law" in cases governed by the common law of the state.[3]

Congress early enacted a statute making the laws of the several states rules of decision for the federal courts in trials at common law, where they apply, save where a federal question is involved.[4] The Supreme Court does not consider decisions of the state courts in common law cases "laws" within the meaning of the act.[5] As suggested, the federal courts feel bound by them on matters they deem to be questions of "local law" but not on questions of "general law."[6]

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but suggests that even so it was inappropriate in this particular case since defendant had actually not relied on any such defense. This objection, however, would be more forceful if defendant had by his evidence controverted the evidence that he was in the possession of the liquor. Bird v. State, 257 Pac. 2 (Wyo., 1927). In the instant case, however, it is only the theory that the State's evidence raised some possibility of doubt as to "home consumption" that prevents the judge from charging the jury that if they believe the evidence of possession the defendant is guilty. The charge actually given putting the burden on defendant is much milder, and if the defendant is not entitled to it, certainly he is not harmed by it.

[1] This note is concerned only with the common law of the states. Suggestive comment is made on the statutory aspect of the problem in a note in 5 Tex. L. Rev. 191.

[2] Black and White Taxicab and Transfer Co. v. Brown and Yellow Taxicab and Transfer Co., 48 Sup. St. 404 (1928). The case involved the validity of a contract between one cab company incorporated in Tennessee and a railroad company incorporated in Kentucky whereby for a money consideration the R. R. Co. granted the cab company the exclusive privileges of going on its premises and trains and in its depots to solicit business. The Kentucky court had uniformly held such contracts invalid as monopolistic. The U. S. Supreme Court held that the question was one of general law and sustained the lower federal court in relying upon its independent judgment to uphold the contract.

[3] Hartford Fire Ins. Co. v. Ry. Co., 175 U. S. 91 (1899).

[4] 28 U. S. C. A., §725 (1926). This statute was first enacted in 1789. As appears from its terms it does not apply to proceedings in equity, admiralty, federal criminal courts, or to any case involving federal questions. Bucher v. Cheshire R. R. Co., 125 U. S. 555, 582 (1888).

[5] R. R. Co. v. National Bank, 102 U. S. 14 (1880).

[6] Cab Co. v. Cab Co., *supra*, note 2.

The federal rule is illustrated in numerous cases that only make it the more questionable. In the well-known case of *Swift v. Tyson,* Justice Story declared that a question concerning commercial paper was one of general law, which the court would determine independently of state decisions.[7] The federal courts have treated as questions of "general law" the validity of a carrier's stipulation against negligence,[8] the liability of a telegraph company to the addressee for failure to deliver either an interstate[9] or an intrastate[10] telegram, the question of priority as between assignees of a debt,[11] the construction of a policy of fire insurance,[12] the validity of the fellow-servant rule[13] and the application of same,[14] the attractive nuisance doctrine as illustrated in the turntable cases,[15] and the illegality of certain contracts as against public policy such as a contract in restraint of marriage.[16] On the other hand, the federal courts follow the decisions of the state courts settling rules of real property[17] such as those referring to riparian rights;[18] likewise in questions relating to title to personalty.[19] Whether a lease of land by a railroad company providing that the lessor would not be liable for damage to the lessee's property on the premises caused by fire from

[7] 16 Peters 1 (1842). The question raised was whether an antecedent debt constituted value for purposes of making one a holder in due course.

[8] Lake Shore, etc. Ry. v. Prentice, 147 U. S. 101 (1893); R. R. Co. v. Lockwood, 17 Wall. 357 (1873).

[9] Western Union Teleg. Co. v. Burris, 179 Fed. 92 (C. C. A. 8th, 1910).

[10] Western Union Teleg. Co. v. Wood, 57 Fed. 471 (C. C. A. 5th, 1893). The court deemed the question of damages for mental anguish one of general law.

[11] Salem Trust Co. v. Manufacturers' Finance Co., 264 U. S. 182, 44 Sup. Ct. 266, 31 A. L. R. 867 (1924).

[12] Carpenter v. The Providence Washington Ins. Co., 16 Peters 495 (1842); Hawkeye Commercial Men's Ass'n. v. Christy, 294 Fed. 208 (C. C. A. 8th, 1923), 40 A. L. R. 46.

[13] Beutler v. Grand Trunk Ry., 224 U. S. 85 (1912).

[14] Baltimore and Ohio R. R. v. Baugh, 149 U. S. 368 (1893).

[15] Snare and Triest Co. v. Friedman, 169 Fed. 1 (C. C. A. 3rd, 1909).

[16] Sheppy v. Stevens, 177 Fed. 484 (C. C. N. D. N. Y., 1910). This court said: "In the federal courts the question whether a contract is contrary to public policy and void is one of general law, and not dependent upon any local statute or usage, and in determining such question the federal courts will exercise their own judgment."

[17] Jackson v. Chew, 12 Wheat. 153 (1827). This case involved the effect of devises in a will which provided for a devise over in case of failure of issue. On the other hand, it has just been held the question of what user the owner of the fee or his lessee may exercise over the right of way of an interstate railroad is one of "general jurisprudence." Midland Valley R. Co. v. Sutter, 28 F. (2d) 163 (C. C. A. 8th., 1928).

[18] Kaukauna Water Power Co. v. Canal Co., 142 U. S. 254 (1891).

[19] Etheridge v. Sperry, 139 U. S. 266 (1891).

the lessor's locomotives is against public policy has been termed a question of local law.[20] Common law questions not pertaining to rules of property have been treated in the large as questions of general law in deciding which the federal courts do not feel bound to follow state court decisions.

The distinction so often drawn between so-called "local" and "general law" is not a happy one. Justice Holmes' dissenting opinion in the case which suggested this note indicated the fallacious basis of the distinction.[21] True, some state law deals with relations that are of general interest throughout the nation and likewise other state law deals with purely local matters. But insofar as the law of the state itself is concerned as law it is either the local law of that state or not law at all. There is no such thing as "general law" in the sense of a general law in all the states over and above the statutory and common law of a given state. The general principles of the commercial law, for example, are not the law of a state simply because their uniform recognition is made desirable by the universal interest in their subject matter. It remains for the state to adopt them into its law if it sees fit.

The Supreme Court of the United States has conceded that there is no common law of the United States existing separate and apart from the law of the states in the same way that federal statutes do.[22] If the highest court of a state has declared what the common law of that state is upon a given question, where else can the federal courts properly look for the common law of that state but in the state court's decisions? So far as that state is concerned the law is settled. That courts legislate is clear enough.[23] In cases governed by the common law of a state should the federal courts recognize and apply that law or follow a policy of laying down what they would have it to be or what they think it should be?[24]

[20] Hartford Fire Insurance Co. v. Ry., *supra* note 3.

[21] *Supra* note 2.

[22] Western Union Teleg. Co. v. Call Pub. Co., 181 U. S. 92 (1901).

[23] Gray, NATURE AND SOURCES OF THE LAW (2nd ed., 1921), p. 121; Cardoza, THE NATURE OF THE JUDICIAL PROCESS (1922), p. 115 *et seq.* And see the dissenting opinion of Holmes, J., in Kuhn v. Fairmont Coal Co., 215 U. S. 349, 370 (1909). For a famous case involving judicial law-making see Fletcher v. Rylands, L. R., 3 H. L. 330 (1868).

[24] The federal statute, *supra* note 4, does not conclude this question because the federal court in the case suggested is supposedly applying the common law of the state just as it would be called on to apply a federal statute to a situation controlled by the same.

In the case first above cited[25] the law of Kentucky, in which state the contract in question was made, had been settled by judicial decision since 1892.[26] Under those decisions the contract in question would have fallen as monopolistic. Thus the public policy of Kentucky was involved, the merits of which do not concern us here. The federal court chose to find what the law and public policy of Kentucky ought to be rather than the law of the case. It happened (due to the work of some lawyer familiar with the federal rule, no doubt) that one of the contracting parties was a foreign corporation.[27] If it had been a local one and the case had arisen in Kentucky the ruling would doubtless have been the reverse of that actually made. The case leaves Kentucky with two conflicting rules of decision with reference to the same transaction. It certainly does not strike one as a case involving the independence of the federal judiciary *versus* subservience to the state courts, but rather as one wherein the federal courts failed in their obligation to apply state law as they find it. Whatever justification there may be in the historical background of the law merchant for the federal rule as applied to commercial paper, that very rule itself fails of application in a case like the Kentucky one, which involves a question of local interest only.

J. B. FORDHAM.

MARSHALING ASSETS IN FAVOR OF JUDGMENT CREDITOR

Where one creditor has a lien on two properties in the hands of the same debtor, and another creditor has a lien on only one of them, the latter, in equity, may frequently force the former to proceed first against the singly charged estate,[1] provided the rights of the double lienholder are not prejudiced thereby,[2] and provided also that the two properties so charged are more than sufficient to satisfy

[25] Cab Co. v. Cab Co., *supra* note 2.

[26] McConnell v. Pedago, 92 Ky. 465, 18 S. W. 15 (1892); Palmer Transfer Co. v. Anderson, 131 Ky. 217, 115 S. W. 182 (1909).

[27] Cab. Co. v. Cab Co., *supra* note 2. The fortunate cab company was a Tennessee corporation. One issue in the case was whether there was a genuine diversity of citizenship since it appeared that the Tennessee cab company had only recently changed its place of incorporation from Kentucky to Tennessee.

[1] Pope v. Harris, 94 N. C. 62 (1886); Harrington v. Furr, 172 N. C. 610, 90 S. E. 775 (1916); Trust Co. v. Godwin, 190 N. C. 512, 130 S. E. 323 (1925). Leading case: Aldrich v. Cooper, 8 Ves. Jr. 382, 32 Reprints 402, 18 E. R. C. 198.

[2] Jones v. Zollicoffer, 9 N. C. 623, 11 Am. Dec. 795 (1823); Knight v. Rountree, 99 N. C. 389, 6 S. E. 762 (1888).